IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's Order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2)(b)

Description of Case

Criminal Jail Appeal No.315 of 2002

Date of decision :-01.03.2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-01.03.2006 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINTIAL

Criminal Jail Appeal No. 315 of 2002

1. Gaudam Bahadur
   S/o Roop Bahadur
   R/o Dilli Gote Padma Ghat
   District Kalikot, Nepal
2. Anil Bahadur
   S/o Padam Bahadur
   R/o Taula Shera P.S. Bhanva
   District Kalikot, Nepal
3. Durga Bahadur
   S/o Veer Bahadur
   R/o Govil P.S. Mamna
   Anchal, Bhandasi
4. Deepak Bahadur S/o Run Bahadur
   R/o Jhujhliya District Kaifali
   Anchal Seti
5. Beer Bahadur S/o Man Bahadur
   R/o Ondra District Bhanva
   Kalikot
6. Raj Kumar Shahi
   S/o Dhan Bahadur Shahi
   R/o Tatapani
   P.S. Vadak Kisi District Jumla
   Anchal Seti, Nepal .....Appellants

Versus

State ...Respondent

Mr. Vinod Sharma learned counsel for the appellants.

Mr. Sudhir Chaudhary learned A.G.A.

Dated :- 01st March, 2006

Hon'ble J. C. S. Rawat, J.

1) This criminal appeal has been preferred from jail against the judgment and order dated 12.9.2002 passed by Sri Rama Kant Sharma, the then Sessions Judge, Rudraprayg in S.T. No.23/2002, whereby the appellants were convicted u/s 460 I.P.C. and sentenced them to undergo R.I. for a period of ten years.

2) The prosecution case in a nutshell is that on 11.6.2002 at about 11-12pm in the night few miscreants tried to break the lock of the Cooperative Bank situated in the upper storey of the house of deceased Budhi Singh Rana. The deceased -Budhi Singh Rana came out from his room with torch and objected them not to do so. On this, the miscreants attacked on him by sariya, subbal and sharp edged weapon (heavy iron rod). When Smt. Rajeshwari Devi (PW2) and Km. Anita tried to rescue the deceased, the miscreants also caused the injuries to them. The accused persons switched off the main switch. Thereafter, the brother of the deceased – Chandra Singh (PW1) was informed about the incident. After receiving the information, Chandra Singh reached at about 12:30PM at the house of his brother–deceased and the entire story was narrated to him. The deceased was immediately taken to Bora Nursing Home, Rudraprayag, from where he was referred to Base Hospital, Srinagar. When Chandra Singh was taking his brother to Base Hospital, Srinagar for medical treatment, the deceased succumbed to his injuries on the way. Thereafter, the deceased was taken back to Rudraprayag Hospital for postmortem. On the very next day i.e. 12.6.2002 at about 8 a.m. Chandra Singh (PW1) lodged the written report (Ex.ka.1) at police station Rudraprayag against the unknown persons. On the basis of the written report, a chick FIR (Ex.ka. 3) was prepared and a case was registered. S.H.O.-R.P.Singh(PW6) inspected the spot and recovered sariya, sabbal, torch, kudal etc. from the place of incident and prepared the recovery memo of these items as Ex.ka.5. He also took the samples of blood stained and plain earth from the place of

incident. He also prepared the site-plan (Ex.ka.7). On being received an information with regard to the whereabouts of the accused persons, R.P. Singh (PW6) alongwith police personnel reached at Madi-Gard and arrested the accused persons in presence of Smt. Rajeshwari Devi (PW2) and Km. Anita (PW3), who reached there and identified the accused persons. The police prepared the arrest memo of the accused, which is marked as Ex.ka.7. The investigation was taken up as usual which culminated into the submission of the chargesheet (Ex.ka.9).

3) Charge was framed under sections 460 IPC against the appellants. The appellants denied the charges and claimed the trial.

4) The prosecution in support of its case examined seven witnesses. The prosecution has adduced the evidence of the brother of the deceased-Chandra Singh(PW1), who lodged the FIR in the police station. Smt. Rajeshwari Devi (PW2) and Km. Anita (PW3) are the wife and daughter of the deceased respectively. They are the eye-witnesses of the incident. Budhi Singh (PW4) has proved the Chick report (Ex.ka.3) and G.D. entry (Ex.ka.4). Shiv Singh Pawar (PW5) has proved the factum of arrest of the accused person. He stated that he reached at the spot where the accused persons were identified by Smt. Rajeshwari Devi (PW2) and Km. Anita (PW3) and thereafter the appellants were arrested and memo Ex.ka.4 was prepared. R.P.Singh (PW6) was the Investigating Officer, who Manendra Singh (PW7) was the Medical Officer, who conducted the postmortem of the deceased and found

the following ante-mortem injuries on the person of the deceased:-

(i) Incised wound measuring 8cm x 0.5cm brain matter deep at the Rt. Side of the neck, just behind the upper portion at the Rt. Pinna extending downward.

(ii) Lacerated wound measuring 8cm x 1cm x brain matter deep at the vault at the skull 19cm above from the middle end at Rt. Eye brow.

(iii) Abrasion at the latent side of the Rt. Elbow joint measuring 5cm x 2cm. Colour reded Brown.

(iv) Multiple abrasions over Rt. Leg. Extending from the knee joint to the foot. Abrasions are situated at the shinad later sided the leg and foot.

(v) Multiple abrasions at the left forearm to the left hand.

(vi) Abrasion measuring 2cm x 2.5cm over the medial mouth and left ankle joint.

In the opinion of the Medical Officer, the death was caused due to shock and haemorrhage resulting from ante-mortem injuries sustained by the deceased. It was also opined that there was a fracture of right paratal bone. It was stated that injury was very fatal and it was caused by the sharp edged weapon. Injury No.2 could be caused by blunt object like subbal. He had further stated tht the death might be caused by injury No.1 & 2. He also proved the postmortem report Ex.ka.15.

5) In the statement recorded u/s 313 Cr.P.C. the appellants denied the prosecution case and stated that they had been falsely implicated in this case. The appellants had stated that they belongs to Nepal and they are the citizens of Nepal.

6) The learned trial court after appraisal of the evidence on record found the appellants guilty and convicted and sentenced them as mentioned above.

7) I have heard Sri Vinod Sharma learned counsel for the appellants and Sri A.Rab learned Addl. G.A. assisted by Sri Rajeev Mohan learned A.G.A. Perused the evidence on record.

8) It need to be mentioned there that it is not disputed that the deceased met a homicidal death on account of injuries sustained on the date of occurrence. The medical officer (PW7) had also deposed that he conducted the postmortem of the dead body of the deceased and also found that the death was caused due to shock and haemorrhage resulting from the ante-mortem injuries. The duration of the death was found within twenty four hours at the time of postmortem examination.

9) Now, I have to examine whether the appellants are the authors of the injuries on the person of the deceased or not. In order to appreciate the evidence, the court is required to bear in mind the set-up and the environment in which the crime was committed. The level of understanding of the witnesses. The over-zealousness of some of the near relations to ensure that everyone connected with the crime be also

convicted. Everyone had a different way of narration of the same facts. Bearing in mind these broad principles, the evidence is required to be appreciated to find out what part out of the evidence represents the true and correct state of affairs. It is for the courts to separate the grain from the chaff.

10) The incident took place in a remote area of district Rudraprayag and the village where the incident took place is situate in the hill area and it was alleged that the appellants tried to make bank dacoity by breaking its lock. It was also in the evidence the evidence that the cooperative bank was situated on the upper storey of the deceased house. On the date of occurrence, the deceased alongwith his wife was in the room situated in the ground floor and his two daughters namely Mamta and Anita (PW3) were asleep in other room. The deceased left the job from the bank six months before the date of incident. The accused persons are said to be citizens of Nepal.

11) Learned counsel for the appellants contended that only two-three unknown persons were indicated in the FIR as the accused persons, but the charge was framed against six persons, who wee convicted by the trial court. It was contended that the appellants had been falsely implicated in the case. There is an averment in the FIR lodged by Chandra Singh (PW1) that two-three miscreants switch off the power and assaulted the deceased. It two-three persons were the miscreants, how the six persons can be convicted and if the power was switched off how the witnesses could see the accused. Learned Addl. G.A. refuted the contention. Perusal of the record reveals that scribe of the FIR is

not the eye-witness. He was informed about the incident at night and he reached at the spot at about 12:30 a.m. in the night. When he reached at the spot, he found that his brother was in a serious condition. Naturally, he took him to nursing home where he was referred to Base Hospital, Srinagar. PW1 had to take his brother to hospital and naturally he would be in hurry for providing the medical treatment to his brother. It is admitted that the distance is 37 km between the hospital and the village where the incident took place. When his brother died on the next day, he immediately went to the police station and lodged the FIR. When he lodged the FIR he was suffering from mental distress and what he scribed in the report was only the factum which he could understand in such circumstances. It is not the case of the parities that the eye witnesses meet him again after the death of the deceased. It is natural that the village is situated 27km from the police station. It is also pertinent to mention here that in the hill there is no good communiation system. The buses or the vehicle do not pay in the hill roads frequently. The people have to undertake the journey on foot to reach the motor-road. Chandra Singh (PW1) would not go for the meticulous details of the accused and role played by them. He would know the substance of the incident hurriedly. As such, the averment made in the FIR that only two-three unknown miscreants caused the injuries to the deceased is not fatal. The accused persons were identified by Smt. Rajeshwari Devi (PW2) and Km. Anita (PW3) on the same day. The second factor which has been indicated in the FIR that the accused persons put off the power switch during the course of incident is of no consequence because PW1 was not the eye-witness of

the incident. If the PW1 would have been eye-witness of the incident, the position would have been otherwise. So far as the averment regarding the switching off, there is no cross examination of this point by the defence to the witnesses. Therefore, I do not find merit in the contention advanced by the learned counsel for the appellants.

12) Learned counsel for the appellants further contended that the identification parade was not held by the prosecution. Smt. Rajeshwari Devi (PW2) and Km. Anita (PW3) were not known to the accused persons at all prior to the incident. It was contended that no description of the accused has been indicated in the FIR. Learned Addl. G.A. refuted the contention. So far as the description in the FIR is concerned, Chandra Singh lodged the FIR and he was no the eye-witness of the incident and he had to take his brother to the hospital immediately. It is a well settled position of law that the substantive evidence of a witness is the statement in court but as a rule of prudence, earlier identification proceedings are held in order to corroborate the testimony of a witness given in the court as regards the identify of the accused who is not known to him from before. It has been held in **State of Maharashtra Vs. Suresh 2000(1) SCC p/471** that *"we remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that*

the suspect is the real person whom the witnesses had seen in connection with the said occurrence."

13) In the instant case, the husband of Smt. Rajeshwari Devi(PW2) sustained the injuries caused by the appellants. These are the circumstances, which would impress upon the mind of Smt. Rajeshwari Devi and Km. Anita the facial expression of the assailants. This impression would not diminish or disappear even after a lapse of time where the husband and the father of the ladies respectively had been assaulted and died on the same day. The facial impression of the assailants must had imprinted in their memory. It is also in the evidence that both these witnesses have sufficient opportunity to observe the features of the accused who not only assaulted the deceased but also assaulted to them. This is not a case where the identifying witnesses had only a fleeting glimpse of the accused persons. The witnesses had a reason to remember that faces of the accused as they had committed a heinous offence. There was no chance of mistake by identifying the accused persons. The accused persons were identified before the court. There is another aspect of this case. The accused persons were arrested on the very next day at about 4p.m. at Madi-Gard by the police personnel headed by R.P.Singh(PW6). It is also in the evidence that Smt. Rajeshwari Devi (PW2) and Km. Anita (PW2) also reached there and identified the accused persons. It is not in the evidence that the police had arrested the appellants prior to the identification. It is not in the evidence that the accused perons had already been arrested and thereafter PW2 and PW3 reached at the spot. The evidence of PW2 & PW3 was assailed on the

ground that they got the information regarding the arrest of the accused persons, therefore, they reached at the spot alongwith the ladies of mahila mangal dal. It was further contended that it is not in the statement recorded under section 161 Cr.P.C. that they went there with the mahila mangal dal. It was pointed out the police sent the information regarding the arrest of the accused and thereafter they reached there. Learned Addl. G.A. refuted the contention. Perusal of the record reveals that the witnesses received the information, but it has not come in the evidence that they have received the information by the police. It is also in the evidence that the other people were there and the police was informed by someone. As soon as the information received, they went at the spot and it was the natural conduct of the witnesses. They reached there and identified the accused and thereafter the accused persons were arrested. Therefore, the contention of the learned counsel for the appellants has not force. It is also established that the accused persons were identified in the court itself. It Is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of the Hon'ble Supreme Court. The facts, which establish the identity of the accused person, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity

of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the state of investigation. They do not constitute substantive evidence and these parades are essentially governed by section 162 Cr.P.C. Failure to hold a test identification in court the weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

14) I have mentioned above that the witnesses had sufficient opportunity to notice their features at the time of incident. On account of the circumstances prevailing at the time of the incident, the faces of the appellants must have imprinted in the memory of the witnesses. The occurrence took place on 11.6.2002 and the accused persons were identified by PW2 & PW3 on the next day i.e. 12.6.2002 at about 4p.m. Thereafter, they were arrested by the police. The identification of the accused either in test identification parade or in court is not a sine qua non in every case if the accused is arrested at the behest of the eye-witnesses or if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by other evidence. In the present case, there are clinching circumstances and evidence of arrest of appellant at the behest of eye–witnesses which unerringly pointing out the accusing finger towards the accused beyond

any reasonable doubt. The accused persons had been identified in the court itself and they were arrested at the pointing out of PW2 and PW3.

15) Learned counsel for the appellants further contended that there was one bulb on the side of the bank as shown in the site plan. It was pointed out that it has been mentioned in the site plan that there were in all three bulbs outside the rooms. The site plan reveals that one bulb was on the first floor where the bank was situated. There were two other bulbs handing in the ground floor in front of each room. Chandra (PW1) stated in the FIR that the main switch was switched off and it is in the evidence that ground floor's blub was switched off by the daughter of the deceased when the miscreants went downwards. It is also in the evidence that the switch of the bulbs were outside the rooms and it is in the evidence that there are staircases by which a person can go to the upper storey from the ground floor. R.P.Singh (PW6) has stated in his evidence that the distance between the room and the staircases is about 8-10 feet. Thus, it is clearly revealed that the incident was seen by the witnesses from such a close distance. It is in the evidence that Rajeshwari Devi (PW2) was also outside the room and she was also assaulted by the accused and third bulb was also lighting outside the room. The averment of the FIR is not fatal as has been held in the preceding paras of the judgment. Thus, there was sufficient light to recognize the miscreants by the witnesses. Therefore, I don not find merit in the contention of the learned counsel for the appellants.

16) It was further contended on behalf of the appellants that PW2 and PW3 were not medically examined by the prosecution. PW2 and PW3 had stated that they were also assaulted by the accused persons during the course of incident. It was contended that if they had also sustained injuries in the incident, they should have been medically examined and it would have corroborated the factum of incident. Learned Addl. G.A. refuted the contention. Perusal of the record reveals that the incident took place in the remote area of the hills and there was a distance of 37 km between the place of incident and the hospital. It is also pertinent to mention here that all the villages situated in the hilly terrain are not connected with the motor roads. PW2 was the wife of the deceased and PW3 was the daughter of the deceased. During the course of the incident, the condition of the deceased was very grave and in these circumstances the persons present at the spot would provide the medical aid first to the seriously injured person. Therefore, the non-examination by the Medial Officer is not fatal to the prosecution. Even if so, they had to travel a long distance i.e. about 34 k.m. to cure their simple injuries in comparison to the injuries sustained by the deceased.

18) Learned counsel for the appellants further contended that subbal which is said to have been used in the incident was not found at the place of incident. At the time of recovery, it was lying at the extreme opposite site of the building. It was further contended that the blood stained was not found on the ‘sariya’ and ‘sabbal’ and if these weapons would have been used in the incident, the blood stains would have been on these

weapons. It was also contended that there is no recovery of sharp edged weapon from the spot. These facts belie the prosecution story. Learned Addl. G.A. refuted the contention. Perusal of the record reveals that the I.O. had stated in his evidence that when the incident took place there was some rain in the night. If it was a rain on the date of incident, the blood stains on these weapons would not be possible on the sariya and subbal. So far as the contention regarding that the sabbal was found on the road is concerned, it cannot be ruled out that after assaulting the deceased they have thrown it on the road. There is no cross examination on this point. It cannot be ruled out that the sharp edged weapon would have been taken by the appellant.

19) The learned counsel for the appellants further contended that there are major contradictions in the testimony of the witnesses. As such, the appellants should be acquitted on this point alone. I have gone through the discrepancies as pointed out by the learned counsel for the appellants. Learned Addl.G.A. contended that these are the minor contradictions. The court has to remove chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, no to merely conclude and leave the case the moment suspicious are created. It is the onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot-free.

20) If the contradictions are there it do not affect the prosecution story. The courts should not take into account such discrepancies, which are bound to come on the truthful testimonies. The discrepancies as pointed out by the learned counsel for the appellants are not of such consequences, which can be named as boulders. The court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a Material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. It has also been held that the Court should have to bear in mind that different witnesses react differently under different situations. **{See Leela Ram Vs. State of Haryana 2000 SCC (Cri) p/222}.**

21) it was contended that the prosecution has not produced the independent witnesses. Learned Addl. G.A. refuted the contention. It was pointed out that one small dispensary had been shown in the adjoining place of incident. It was further pointed that there are other person reside in the same home. It is not in

evidence that there were persons present in the home. Apart this, it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are a harassed lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination,.

22) In view of the above discussion, I am of the view that the prosecution has established the guilt beyond reasonable doubt against the appellants. I find that the learned trial court has rightly convicted and sentenced the appellants by a reasoned judgment and there is no infirmity in the judgment passed by the trial court. Hence, the appeal is dismissed and the conviction and sentence awarded by the Trial court are confirmed.

23) Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within three months.

(J.C.S. RAWAT, J.)

Dated 01.03.2006
LSR